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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/542,180

12/19/2005

Renate Kunze

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30234 7590 10/30/2008
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EXAMINER

KRAUSE, ANDREW E

ART UNIT

PAPER NUMBER

4152

MAIL DATE

DELIVERY MODE

10/30/2008

PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No. 10/542,180	Applicant(s) KUNZE ET AL.	
	Examiner ANDREW KRAUSE	Art Unit 4152	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☐ Responsive to communication(s) filed on ____.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-14 is/are pending in the application.
4a) Of the above claim(s) ____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) ____ is/are allowed.
- 6) ☒ Claim(s) 1-14 is/are rejected.
- 7) ☐ Claim(s) ____ is/are objected to.
- 8) ☐ Claim(s) ____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☒ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on ____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☒ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
a) ☒ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. ____.
 3. ☒ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413)
Paper No(s)/Mail Date. ____. |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)
Paper No(s)/Mail Date ____. | 6) <input type="checkbox"/> Other: ____. |

DETAILED ACTION

Oath/Declaration

1. The oath or declaration is defective. A new oath or declaration in compliance with 37 CFR 1.67(a) identifying this application by application number and filing date is required. See MPEP §§ 602.01 and 602.02.

The oath or declaration is defective because: It was not executed in accordance with either 37 CFR 1.66 or 1.68. It lacks the inventors' signatures.

Information Disclosure Statement

The listing of references in the Search Report is not considered to be an information disclosure statement (IDS) complying with 37 CFR 1.98. 37 CFR 1.98(a)(2) requires a legible copy of: (1) each foreign patent; (2) each publication or that portion which caused it to be listed; (3) for each cited pending U.S. application, the application specification including claims, and any drawing of the application, or that portion of the application which caused it to be listed including any claims directed to that portion, unless the cited pending U.S. application is stored in the Image File Wrapper (IFW) system; and (4) all other information, or that portion which caused it to be listed. In addition, each IDS must include a list of all patents, publications, applications, or other information submitted for consideration by the Office (see 37 CFR 1.98(a)(1) and (b)), and MPEP § 609.04(a), subsection I. states, "the list ... must be submitted on a separate paper." Therefore, the references cited in the Search Report have not been considered unless noted on the PTO-892 form. Applicant is advised that the date of submission of any item of information or any missing element(s) will be the date of

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submission for purposes of determining compliance with the requirements based on the time of filing the IDS, including all "statement" requirements of 37 CFR 1.97(e). See MPEP § 609.05(a).

Specification

Arrangement of the Specification

As provided in 37 CFR 1.77(b), the specification of a utility application should include the following sections in order. Each of the lettered items should appear in upper case, without underlining or bold type, as a section heading. If no text follows the section heading, the phrase "Not Applicable" should follow the section heading:

- (a) TITLE OF THE INVENTION.
- (b) CROSS-REFERENCE TO RELATED APPLICATIONS.
- (c) STATEMENT REGARDING FEDERALLY SPONSORED RESEARCH OR DEVELOPMENT.
- (d) THE NAMES OF THE PARTIES TO A JOINT RESEARCH AGREEMENT.
- (e) INCORPORATION-BY-REFERENCE OF MATERIAL SUBMITTED ON A COMPACT DISC.
- (f) BACKGROUND OF THE INVENTION.
 - (1) Field of the Invention.
 - (2) Description of Related Art including information disclosed under 37 CFR 1.97 and 1.98.
- (g) BRIEF SUMMARY OF THE INVENTION.
- (h) BRIEF DESCRIPTION OF THE SEVERAL VIEWS OF THE DRAWING(S).
- (i) DETAILED DESCRIPTION OF THE INVENTION.
- (j) CLAIM OR CLAIMS (commencing on a separate sheet).
- (k) ABSTRACT OF THE DISCLOSURE (commencing on a separate sheet).
- (l) SEQUENCE LISTING (See MPEP § 2424 and 37 CFR 1.821-1.825. A "Sequence Listing" is required on paper if the application discloses a nucleotide or amino acid sequence as defined in 37 CFR 1.821(a) and if the required "Sequence Listing" is not submitted as an electronic document on compact disc).

2. The disclosure is objected to because of the following informalities: The specification is not formatted as provided in 37 CFR 1.77(b).

Appropriate correction is required.

Claim Objections

3. Claim 6 is objected to under 37 CFR 1.75(c), as being of improper dependent form for failing to further limit the subject matter of a previous claim. Applicant is required to cancel the claim(s), or amend the claim(s) to place the claim(s) in proper dependent form, or rewrite the claim(s) in independent form. Claim 6 is a duplicate of claim 3.

4. Claims 4-14 are objected to under 37 CFR 1.75(c) as being in improper form because a multiple dependent claim cannot depend from any other multiple dependent claim. See MPEP § 608.01(n). While the claims need not have been further treated on the merits, the Examiner has set forth pertinent rejections as a courtesy.

Claim Rejections - 35 USC § 103

5. The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

6. This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was

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not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

7. **Claims 1-7** are rejected under 35 U.S.C. 103(a) as being unpatentable over Loos (DE 736 363 C, English Translation) in view of 'A Guide to Bread' (NPL Reference 1).

8. Loos discloses a baked rye product that is produced using rye grain with no other types of flour added (therefore over 50% of the grain products therein are rye) (page 2, paragraph 3), to which yeast is added (page 3, paragraph 1), and is allowed to mature for over 12 hours before baking (page 3, paragraph 1), with no sourdough or dough acidifiers being added to the dough (page 2, paragraph 1).

9. Loos fails to disclose that the bread contains shortening in a quantity of at least .5% based on the weight of the ground grain product. However, 'A Guide to Bread' discloses adding shortening to bread doughs (see 'Butter').

10. It would have been obvious to one having ordinary skill in the art at the time of the invention to combine the rye bread formula of Loos with the addition of shortening to the dough because shortening makes the bread tender and gives the bread a longer shelf life (see 'A Guide to Bread' , 'Butter').

11. Although 'A Guide to Bread' does not explicitly state adding shortening in the quantity disclosed, it would have been obvious to one having ordinary skill in the art at the time of the invention to adjust the amount of shortening used to achieve the desired result, since it has been held that discovering the optimum value of a result effective

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value involves only routine skill in the art. *In re Boesch*, 617 F.2d 272, 205 USPQ 215 (CCPA 1980).

12. Regarding the bread having a pH value of more than 4.7, since the baked rye product disclosed by Loos in view of 'A guide to bread' has the same composition as the claimed baked rye product, it will have the same properties. "Products of identical chemical composition can not have mutually exclusive properties." A chemical composition and its properties are inseparable. Therefore, if the prior art teaches the identical chemical structure, the properties applicant discloses and/or claims are necessarily present. *In re Spada*, 911 F.2d 705, 709, 15 USPQ2d 1655, 1658 (Fed. Cir. 1990).

13. **Regarding claim 2**, it would have been obvious to one having ordinary skill in the art at the time of the invention to adjust the amount of shortening used to achieve the desired result, since it has been held that discovering the optimum value of a result effective value involves only routine skill in the art. *In re Boesch*, 617 F.2d 272, 205 USPQ 215 (CCPA 1980).

14. **Regarding claim 3**, , since the baked rye product disclosed by Loos in view of 'A guide to bread' has the same composition as the claimed baked rye product, it will have the same properties. "Products of identical chemical composition can not have mutually exclusive properties." A chemical composition and its properties are inseparable. Therefore, if the prior art teaches the identical chemical structure, the properties applicant discloses and/or claims are necessarily present. *In re Spada*, 911 F.2d 705, 709, 15 USPQ2d 1655, 1658 (Fed. Cir. 1990).

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15. **Regarding claim 4**, Loos discloses maturing the dough before baking at 10 to 12° C for around 48 hours (bottom of page 2-top of page 3). Although the maturation time and temperature disclosed by Loos differs slightly from that of the instant claim, it is considered to be substantially close to the conditions disclosed in the prior art to be prima facie obvious, and to have the same properties. *Titanium Metals Corp.*, 227 USPQ 773 (CAFC 1985)

16. **Regarding claim 5**, Loos further discloses making the bread using a pre-dough process (see page 5, paragraph 2 for the discussion of a starter dough).

17. **Regarding claim 6**, since the baked rye product disclosed by Loos in view of 'A guide to bread' has the same composition as the claimed baked rye product, it will have the same properties. "Products of identical chemical composition can not have mutually exclusive properties." A chemical composition and its properties are inseparable. Therefore, if the prior art teaches the identical chemical structure, the properties applicant discloses and/or claims are necessarily present. *In re Spada*, 911 F.2d 705, 709, 15 USPQ2d 1655, 1658 (Fed. Cir. 1990).

18. **Regarding claim 7**, it would have been obvious to one having ordinary skill in the art at the time of the invention to adjust the fineness of the rye flour used to achieve the desired result, since it has been held that discovering the optimum value of a result effective value involves only routine skill in the art. *In re Boesch*, 617 F.2d 272, 205 USPQ 215 (CCPA 1980).

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19. **Claim 8** is rejected under 35 U.S.C. 103(a) as being unpatentable over Loos in view of 'A Guide to Bread' as applied to claim 1 above, in further view of Wagner (US #6,039,982).

20. Loos in view of 'A Guide to Bread' discloses the baked rye product of claim 1, but fails to disclose adding hemicellulases to the dough.

21. However, Wagner discloses adding hemicellulases to bread doughs (column 4, lines 24-39).

22. It would have been obvious to one having ordinary skill in the art at the time of the invention to combine the baked rye product of Loos in view of 'A Guide to Bread' with the addition of hemicellulases to the dough as disclosed by Wagner, because hemicellulases are known to be dough improving compositions (Wagner, column 4, lines 24-30).

23. Regarding the quantities of hemicellulase added, it would have been obvious to one having ordinary skill in the art at the time of the invention to adjust the quantity of hemicellulase used to achieve the desired result, since it has been held that discovering the optimum value of a result effective value involves only routine skill in the art. *In re Boesch*, 617 F.2d 272, 205 USPQ 215 (CCPA 1980).

24. **Claims 9 and 11** are rejected under 35 U.S.C. 103(a) as being unpatentable over Loos in view of 'A Guide to Bread' as applied to claim 1 above, and further in view of 'Sweedish Rye Bread'.

25. Loos in view of 'A Guide to Bread' discloses the baked rye product of claim 1, but does not recite a specific recipe as in the instant claims.

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26. **Regarding claim 9**, 'Sweedish Rye Bread' discloses a recipe for a baked rye product made from rye flour, wheat flour, oil, yeast, salt and water. It would have been obvious to one having ordinary skill in the art at the time of the invention to adjust the ratio of these ingredients for the intended application, since it has been held that discovering the optimum value of a result effective variable involves only routine skill in the art. *In re Boesch*, 617 F. 2d 272, 205 USPQ 215 (CCPA 1980).

27. It would have been obvious to one having ordinary skill in the art at the time of the invention to combine the baked rye of Loos in view of a 'Guide to Bread' with the ingredients disclosed by 'Sweedish Rye Bread' since all elements were known at the time of the invention and could have been combined to yield predictable results.

28. **Regarding claim 11**, 'Sweedish Rye Bread' discloses a recipe for a baked rye product made from rye flour, wheat flour, oil, yeast, salt and water. It would have been obvious to one having ordinary skill in the art at the time of the invention to adjust the ratio of these ingredients for the intended application, since it has been held that discovering the optimum value of a result effective variable involves only routine skill in the art. *In re Boesch*, 617 F. 2d 272, 205 USPQ 215 (CCPA 1980).

29. Regarding the shape of the bread in either claim, the configuration is a matter of choice which a person ordinary skill in the art would have found obvious absent persuasive evidence that the particular configuration claimed was significant. *In re Dailey*, 357 F. 2d 669, 149 USPQ 47 (CCPA 1966).

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30. These claims are treated as product by process claims. As set forth in MPEP 2113, product by process claims are NOT limited to the manipulations of the recited steps, only to the structure implied by the steps.

31. **Claims 10,12 and 14** are rejected under 35 U.S.C. 103(a) as being unpatentable over Loos in view of 'A Guide to Bread' in view of Wagner as applied to claim 8 above, and further in view of 'Sweedish Rye Bread'.

32. **Regarding claim 10**, 'Sweedish Rye Bread' discloses a recipe for a baked rye product made from rye flour, wheat flour, oil, yeast, salt and water. Wagner further discloses adding a hemicellulase enzyme to bread doughs (column 4, lines 25-39). It would have been obvious to one having ordinary skill in the art at the time of the invention to adjust the ratio of these ingredients for the intended application, since it has been held that discovering the optimum value of a result effective variable involves only routine skill in the art. *In re Boesch*, 617 F. 2d 272, 205 USPQ 215 (CCPA 1980).

33. It would have been obvious to one having ordinary skill in the art at the time of the invention to combine the baked rye of Loos in view of a 'Guide to Bread' in view of Wagner with the ingredients disclosed by 'Sweedish Rye Bread' since all elements were known at the time of the invention and could have been combined to yield predictable results.

34. **Regarding claim 12**, 'Sweedish Rye Bread' discloses a recipe for a baked rye product made from rye flour, wheat flour, oil, yeast, salt and water and sugar. Wagner further discloses adding milk powder to provide crust color (column 4,line 61), and a pentosane containing baking agent (column 4, lines 24-39) to bread doughs. It would

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have been obvious to one having ordinary skill in the art at the time of the invention to adjust the ratio of these ingredients for the intended application, since it has been held that discovering the optimum value of a result effective variable involves only routine skill in the art. *In re Boesch*, 617 F. 2d 272, 205 USPQ 215 (CCPA 1980).

35. **Regarding claim 14**, 'Sweedish Rye Bread' discloses a recipe for a baked rye product made from rye flour, wheat flour, oil, yeast, salt and water and sugar. Wagner further discloses adding milk powder to provide crust color (column 4, line 61). It is well known in the culinary arts to add dried fruits and spices to baked goods to improve flavor. It would have been obvious to one having ordinary skill in the art at the time of the invention to adjust the ratio of these ingredients for the intended application, since it has been held that discovering the optimum value of a result effective variable involves only routine skill in the art. *In re Boesch*, 617 F. 2d 272, 205 USPQ 215 (CCPA 1980).

36. Regarding the shape of the bread in either claim, the configuration is a matter of choice which a person ordinary skill in the art would have found obvious absent persuasive evidence that the particular configuration claimed was significant. *In re Dailey*, 357 F. 2d 669, 149 USPQ 47 (CCPA 1966).

37. These claims are treated as product by process claims. As set forth in MPEP 2113, product by process claims are NOT limited to the manipulations of the recited steps, only to the structure implied by the steps.

38. **Claim 13** is rejected under 35 U.S.C. 103(a) as being unpatentable over Loos in view of 'A Guide to Bread' as applied to claim 1 above, and further in view of Wagner, Degen (Derwent Abstract of DE 297 21 206 U1) and 'Baker's Bread'.

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39. Loos in view of 'A Guide to Bread' discloses a recipe for a baked rye product made from rye flour, butter, yeast, salt and water and sugar. Wagner further discloses adding milk powder to provide crust color (column 4, line 61).

Regarding the flavoring mixture, 'Bakers' Bread' discloses recipes for stollen, wherein flavorings such as sultanas, lemon (citron) and orange peel, and bitter almonds ('German Stollen' and 'Almond Stollen'). Degen further discloses adding brandy to stollen (Derwent abstract of DE 297 21 206). At the time the invention was made, it would have been an obvious matter of design choice to a person of ordinary skill in the art to produce a flavoring mixture for a stollen to suit the tastes of the intended consumer, since it is well known that it is possible to add a wide range of flavorings to stollen. Therefore, it would have been prima facie obvious to modify Loos in view of 'A Guide to Bread' in further view of Wagner and 'Bakers' Bread' to obtain the invention as specified in claim 13 because such a modification would have been considered a mere design consideration which fails to patentably distinguish over the prior art.

40. It would have been obvious to one having ordinary skill in the art at the time of the invention to adjust the ratio of these ingredients for the intended application, since it has been held that discovering the optimum value of a result effective variable involves only routine skill in the art. *In re Boesch*, 617 F. 2d 272, 205 USPQ 215 (CCPA 1980).

41. It would have been obvious to one having ordinary skill in the art at the time of the invention to combine the baked rye of Loos in view of a 'Guide to Bread' in view of Wagner with the ingredients disclosed by Wagner and 'Baker's Bread' since all

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elements were known at the time of the invention and could have been combined to yield predictable results.

42. This claim is treated as a product by process claim. As set forth in MPEP 2113, product by process claims are NOT limited to the manipulations of the recited steps, only to the structure implied by the steps.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to ANDREW KRAUSE whose telephone number is (571)270-7094. The examiner can normally be reached on 7:30-5, off every other Friday.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Joseph Del Sole can be reached on (571)272-1130. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/ANDREW KRAUSE/
Examiner, Art Unit 4152

/Joseph S. Del Sole/
Supervisory Patent Examiner, Art Unit 4152